In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOSEPH BRADFIELD, APPELLANT,
v.
ELLIS H. ROBERTS, TREASURER of the United States. } No. 76.

APPEAL FROM THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT.

The appellant, who appears here *propria persona*, appeals from a decree of the court of appeals of the District of Columbia reversing a decree of the supreme court of the District, by the latter of which decrees a bill in equity, filed by the appellant as "a citizen and taxpayer of the United States and a resident of the District of Columbia," on his own behalf, and that of "all other

citizens of the United States similarly situated," was sustained and the injunction therein prayed against the Treasurer of the United States granted. The complaint was that an alleged agreement (which appears to have dropped out of the case) between the Surgeon-General of the Army and the directors of Providence Hospital of the city of Washington, made by authority of law, and a contract made by the Commissioners of the District with the directors of Providence Hospital (to which the bill imputes a sectarian character) to carry out an appropriation by Congress for the treatment of minor contagious diseases were contrary to the first amendment of the Constitution, namely, that "Congress shall make no law respecting an *establishment of religion* * * * ," and the prayer of the bill was that the defendant, as Treasurer of the United States, be restrained from paying out any money of the United States or of the District of Columbia under the contract in question. The allegation of the bill was that the agreement was "contrary to the article of the Constitution which declares that Congress shall make no law respecting a *religious establishment*."

The District appropriation act of March 3, 1897 (29 Stat., 665, 669), appropriates—

> For two isolating buildings, to be constructed, in the discretion of the Commissioners of the District of Columbia, on the grounds of two hospitals and to be operated as a part of such hospitals, $30,000.

It is to be noted that on the same date an act was passed entitled "An act to prevent the spread of contagious diseases in the District of Columbia" (id., 635).

The contract in question (Rec., p. 4) provides that the District Commissioners—

> Will erect on the grounds of said hospital an isolating building or ward for the treatment of minor contagious diseases, said building or ward to be erected without expense to said hospital, except such as it may elect, but to be paid out of an appropriation for that purpose contained in the District appropriation bill approved March 3, 1897, on plans to be furnished by the said Commissioners and approved by the health officer of the District of Columbia; and that when the said building or ward is fully completed it shall be turned over to the officers of Providence Hospital, subject to the following provisions: First, that two-thirds of the entire capacity of said isolating building or ward shall be reserved for the use of such poor patients as shall be sent there by the Commissioners of the District from time to time through the proper officers. For each such patient said Commissioners and their successors in office are to pay at the rate of $250 per annum for such a time as such patient may be in the hospital, subject to annual appropriations by Congress.
> * * *
>
> And said Providence Hospital agrees to always maintain a neutral zone of 40 feet around such isolating building or ward and grounds connected therewith to which patients of such ward have access.

The omitted portion provides for admission to the isolating ward, on arrangements determined by those in charge thereof, of persons able to pay the Providence Hospital.

Before presenting the more formal initial objections to the bill or entering upon a discussion of the case on the merits, it is deemed proper to state certain preliminary

facts and to suggest to the court whether the appeal herein should not be dismissed.

1. It seems, from open records at the Treasury, that only $3.57 of this appropriation were expended, and that then, by operation of law (1 Supp. R. S., 18), the appropriation lapsed and was repaid into the Treasury. There is, therefore, nothing on which the injunction may operate and rest, and it falls by its own weight. Any later appropriation for the same purpose which may have been made and which may have been expended in whole or in part, though raising the same constitutional question, is not included in these proceedings.

There is therefore only a moot question before the court, which the court will decline to consider. (*Bartemeyer* v. *Iowa*, 18 Wall., 129; *Chicago and Vincennes R. R.* v. *Fosdick*, 106 U. S., 47, 84; *San Mateo Co.* v. *Southern Pac. R. R.*, 116 U. S., 138; *Kimball* v. *Kimball*, 174 U. S., 158, 163.)

2. The constitutional prohibition forbids an "*establishment of religion;*" that is, a state church. Whatever further is included in withholding the right to "make laws respecting an *establishment of religion*" is not of moment here, for the farthest stretch of the meaning of language might make Providence Hospital a *religious establishment* (though not surely in true intent), but not by any possibility an *establishment of religion*. There being therefore no substantial question before the court, it is suggested that the case is frivolous and falls within the concluding provision of Rule VI, section 5, and should be dismissed.

The assignments of error (not in the record) appear at pages 1–8 of the appellant's brief; and the opinion of the supreme court of the District (which was reversed), also not in the record, will be found in 26 Washington Law Rep., 242.

ARGUMENT.

I.

Respecting the brief for appellant.

This is taken up out of the natural order to notice some features which are not strictly part of the argument, but to which we desire to call the court's attention.

The appellant seems to see in this beneficent contract, made pursuant to an appropriation to carry out the Congressional scheme of health protection in the District, a subtle and dangerous encroachment of ecclesiastical influence (Brief, p. 27), in obedience to which a law, though fair on its face and impartial in appearance, will be administered by public authority with an evil eye and an unequal hand (citing a decision of the court in a Chinese exclusion case, p. 16), and the principles of the underlying social compact be overthrown and security for personal and religious liberty and private property be taken away (pp. 10, 12). He finds in the erection, under the act, of the proposed building upon land of the hospital a payment in aid of an institution under sectarian control and a flagrant violation of the Constitution, because it is for the benefit of priestcraft and in support of a religious worship (id. *et passim*). He seeks in the Quebec act (by which Great Britain granted religious

toleration and freedom and confirmed certain ecclesiastical rights in Canada), a potent, indeed the immediate, cause of the American Revolution (p. 21), picturing the colonial horror and dismay that it created [in the very different state of religious feeling in those times] as "an atrocious infraction of the rights of Englishmen" (pp. 18–24). He investigates the theological dogma of supererogation, and therefrom draws a conclusion that taxes embraced in the appropriation for the isolating ward of the hospital would be used for the enrichment of church authorities and the encouragement of crime (p. 39). State court judgments, holding that under special and peculiar constitutional and statutory provisions public funds may not be paid out in aid of sectarian schools, even if a *quid pro quo* is rendered, he finds generally are in accord with the soundest philosophy, and cites Plato to show that our guardians should erect barriers in the matter of education, for there it is that superstition insinuates itself in the guise of amusement or religion, professing to do no mischief. (P. 47.)

An assignment of error (No. 8, plaintiff's brief, p. 7) finds error in the failure of the court below "to construe the *mortmain clause of the Federal Constitution* in the light of the English laws of mortmain and charitable uses whose principles it embodies;" and the brief contends that the act of Congress and the contract of the Commissioners are in effect a license in mortmain, and that (p. 57) the power to grant such was not delegated to Congress, but was denied by the first amendment for the same reasons that impelled England to deny to "religious houses" the right to hold lands without license from the

Crown; that is, the common defense and general welfare as expressed in the statute *de religiosis* of Edward I.

Now, the authorities which appellant cites (p. 58) show (as all authorities do) that the English statutes of mortmain were feudal in their origin, motive, and purpose, and designed to prevent abuses some centuries ago by which the *clergy* in monastic times made new and continued acquisition of lands. The intent was to prevent lands from going into the hands of *religious houses* and other hands where they would be inalienable. It may be noted here that the Pennsylvania doctrine is that the statutes of mortmain have been extended to Pennsylvania only so far as they prohibit any dedication of property to *superstitious* uses and grants to corporations without a statutory license. (*Methodist Church* v. *Remington et al.*, 1 Watts, 218.)

II.

Respecting formal objections to granting the relief prayed.

These are in addition to the similar objections noted in the statement. They will be considered briefly because the court of appeals, while pointing out their force and showing, indeed, that they were fatal to the bill, deemed it judicious to take the case upon the merits; and this court may be of the same opinion. The Government has no strenuous objection to interpose. We therefore merely state and submit these objections to the judgment of the court.

1. The complainant sues as a citizen and taxpayer, and yet *in forma pauperis*.

2. Inasmuch as the appropriation was for $30,000, to be expended on isolating wards at two hospitals, $15,000 is the real amount involved at the Providence Hospital, and the complainant's share of that burden as one of the taxpayers of the United States is probably less than 1 mill.

The supreme court of the District of Columbia, in the case of *Grant* v. *Cooke* (7 D. C., pp. 203–4), says:

> No special injury peculiar to these complainants is stated in the bill. The only grievance they can suffer consists in the probability, if not certainty, of increased taxation, which, however, will fall to the experience of every taxpayer in the District. No private damage is pretended. Now, no doctrine is better settled than that a bill to restrain the enforcement of a public law can not be maintained unless the plaintiff is threatened with an injury peculiar to himself, and the special grievance of which he complains must not only be possible and imminent, but be clearly set up. [Citing *Miller* v. *Grundy*, 13 Mich., 550; *Hale* v. *Cushing*, 6 Mich., 425; *Roosevelt* v. *Drake*, 23 N. Y., 318; *Dows* v. *Chicago*, 11 Wall., 108.]

See also the case of *Doolittle* v. *Supervisors of Broome Co.* (18 N. Y., 155), by which it is denied that a citizen as a voter and taxpayer may enjoin public authorities from the execution of a law which the complainant conceives to be passed without constitutional authority.

3. The bill is defective for lack of proper parties, in that it seeks to set aside a contract between parties who are not parties to this suit.

4. The bill may not be sustained, because it seeks to enjoin a United States officer from exercising a power which

is executive and may be regarded as discretionery *sub modo* and not merely ministerial, and from carrying out a law of the United States. (*Marbury* v. *Madison*, 1 Cr., 137; *United States ex rel* v. *Lamont*, 155 U. S., 333.) The courts have sustained such injunctions as the present one against municipal corporations (*Crampton* v. *Zabriskie*, 101 U. S., 601), but have not extended them to the National or State Governments, holding that neither the executive nor the legislature may be restrained, although their acts when performed are, in proper cases, subject to judicial cognizance. (*Mississippi* v. *Johnson*, 4 Wall., 475; *State of Georgia* v. *Stanton*, 6 Wall., 50). And the doctrine that the courts will not interfere with the performance by an executive officer of his ordinary duties is stated in *Gaines* v. *Thompson* (7 Wall., 352) to be as applicable to the writ of injunction as it is to the writ of mandamus.

5. Considering, perhaps, that the right to the writ may be allowed irrespective of formal defects and preliminary objections in a case raising clearly and strongly a grave constitutional objection, we say that the complainant can not thus make a case in order to try the validity of an act of Congress, although after a proper case is made the judiciary may determine the rights of the respective parties, and that to grant sufficient title in the complainant to file this bill is to say that he may enjoin an officer of the United States from paying over money of the United States under any appropriation whatever, and from executing any law which he conceives to be unconstitutional; so that every act of Congress immediately upon its passage may be called in question by a bill in

equity to enjoin the public authorities from executing it. In fact, the doctrine seems to be well settled that a public law can in no way be declared null and void by a bill filed against the Executive Department asking that it be enjoined from carrying it out.

III.

Respecting the constitutional provision, the statutes, and the contract.

But if the court, affirming the view of the court below, desire, notwithstanding the preliminary objections, to take the case on the merits, then, relying on the exhaustive, cogent, and learned opinion of the court below (Rec., pp. 2–22), in place of an extended argument, we submit:

1. Regarding the bill, then, as if in reality directed against the District of Columbia by a plaintiff entitled to sue and to prevent a damage irremediable at law, the Providence Hospital, a private corporation, duly incorporated by act of Congress of April 8, 1864 (13 Stat., 43), is not even a *religious establishment*. The bill alleges that "it is composed of members of a monastic order or sisterhood of the Roman Catholic Church, and is conducted under the auspices of said church;" but the incorporators are named as private individuals, without any clerical prefix (if such belong to them), and the charter does not contain a word of religious import. It gives to this corporation the ordinary corporate powers—the right to sue, to have a seal, to hold and dispose of property (which seems to remove the argument on the statutes of mortmain), to make all laws and regulations

consistent with law, and, by clear and necessary inference, at least, the power to contract—all to be exercised for the purpose of opening and keeping a hospital for the care of sick and invalid persons. Surely, under these circumstances, religious liberty is truly concerned to see that the religious opinions of the members of the corporation are not the subject of inquiry. (*Watson* v. *Jones*, 13 Wall., 679, 724, 725; opinion of court below, Rec., p. 14.) This is a corporate charity, in the modern sense, founded upon humane and beneficent purposes, and rightly fostered and sustained for the general good by the municipality in view of the Government powers as to health and police, but it is not a charity or a charitable or religious use for pious purposes in the ancient sense. It is in no true meaning of language a religious establishment. Why, then, under the power possessed by the directors and granted to the Commissioners by the appropriation act, should not this contract for furthering the laudable and necessary scheme of health protection for the District be made? It is a well-known fact that Congress has incorporated in the District of Columbia many charitable, educational, and religious societies, some expressly under church auspices, and has made grants to such (4 Stat., 603; 6 id., 538; report of Joint Select Committee on Charities of the District of Columbia, made March 1, 1898); and it is not to be denied that Congress in District legislation possesses the combined powers of a general government and of a State, and that the necessary care of the public health and the maintenance of public charities are within those powers; nor is it to be denied that it has been the practice of Congress

for many years to make provision for the care of the sick and for the maintenance and training of various classes of defectives, and for other objects of charity and reform, through appropriations for private institutions in consideration of service rendered and upon special contract.

2. Even if Providence Hospital were a *religious establishment*, it certainly is not an *establishment of religion*, and it is against laws respecting an establishment of religion that the constitutional prohibition is directed.

President Madison, in a message dated February 21, 1811, vetoing an act for the incorporation of a Protestant Episcopal church in Alexandria, then in the District of Columbia, did so because, in his opinion, the church was to a certain extent a *religious establishment* by law, and because a legal force and sanction would be given to certain articles in its constitution. A few days later he vetoed an act for the relief of a Baptist church in the Mississippi territory, because the bill provided a principle and precedent "contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" (Richardson's Messages of the Presidents, vol. 1, pp. 489, 490.) It is to be noted that President Madison in both messages erroneously quoted the language of the amendment. While the opinion of President Madison is entitled to the greatest respect, it appears that it has not been taken as a precedent (quite apart from the strange mistake in quotation), because, as above shown, Congress has customarily granted charters to charitable and religious societies, and cases involving grants to such societies have passed the Supreme Court without the validity of such grants

being challenged. (*B. & P. R. R. Co.* v. *Fifth Baptist Church*, 137 U. S., 568; *Missionary Society* v. *Dalles*, 107 U. S., 336, 339; *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U. S., 155, 171.) Justice Story also, in the case of *Terrett* v. *Taylor* (9 Cr., 43, 47, 49, 51), uses the term *religious establishment* in reference to a church, but not in connection with the amendment to the Constitution, and holds that it was competent for the people of Virginia to disestablish the colonial church and withhold from it any support by public taxation, but also holds that it was competent for the legislature to incorporate the church and confirm its title, and that such a legislative grant is irrevocable.

An establishment of religion means a State church, an ecclesiastical system inaugurated and supported by the State, and in such a case religious liberty is impaired, according to American views and policy, because the citizen is taxed to support the State form of worship, and the preference is given to that form. Without attempting to define the further scope of the prohibitory words, the inhibition was intended to secure nothing more than complete religious liberty to all persons, the separation of church and state, and the prohibition of any preference by law in favor of any one religious persuasion or mode of worship. (Cooley's Const. Lim., 6th ed., p. 575; 2 Story Const., sec. 1871 et seq.; 2 Kent's Com., 34, 35, and auth. cit.) The end to be sought is the end of equality before the State and the law, which is dwelt upon in the opinion of Justice Story, *supra*, who shows very clearly that the grant of corporate powers and the confirmation of title to property is not justly to be deemed

as restraining the free exercise of religion or denying that equality. And Chief Justice Waite, in the case of *Reynolds* v. *United States* (98 U. S., 145, 162, 164), approves the following statement of Mr. Jefferson "as an authoritative declaration of the scope and effect of the amendment thus secured:"

> I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a *wall of separation between church and State.*

As to certain decisions of State courts, discussed below and arising upon peculiar and different constitutional or statutory provisions of law, the court below did not approve thereof as applicable to this case, or, rather, found that there was no necessary antagonism between them and the conclusion reached herein below. We respectfully submit that the court may properly affirm that view upon examination of those cases, and whether or not they or all of them were properly decided is not a question at issue here. The gist of them is that special clauses of law prohibiting donations to a church or appropriations in aid of any church or sectarian purpose embrace all appropriations and payments, whether made for a consideration or not.

3. The appropriation act in question (29 Stat., 683) contains a clause which declares it to be the policy of the Government of the United States to make no appropriation for the purposes of aiding any church or institution under sectarian or ecclesiastical control, by which it was

enacted that from June 30, 1898, no money appropriated for charitable purposes in the District of Columbia should be paid to any church or to any institution which is under such control. The appropriations under the act of March 3, 1897, are limited to the fiscal year ending June 30, 1898. The new policy is declared to take effect and be in force *from June 30, 1898*. The appellant relies greatly upon this provision as showing a declaration of departure in public policy which limits and controls the discretion of the District Commissioners in the matter of the contract under consideration, and this view was approved by the learned justice in the supreme court of the District. But how is it possible to hold that an act, the purpose of which will have been accomplished on June 30, 1898, is to be restrained by a clause which is expressly declared not to come into force and operation until after that date? And how can it be considered, either, that the provision influences appropriations that will be exhausted before it takes effect, or that it can bind the succeeding Congress, which enacted the appropriation bill for the year beginning July 1, 1898? It appears to have no legal force and meaning, except as a declaration of an abstract view of public policy not affecting the operation of the act of which it was a part, and not properly controlling expenditures under the appropriations of later Congresses.

We therefore contend that there is no valid objection to the power to contract as exercised by the directors of the hospital and the Commissioners of the District, and that a law authorizing a contract without discrimination

or preference, or one made under general discretion reposed in authorized agents, for the rendering of service in caring for the sick and preventing contagion, with a corporation that may be under the control of a church should not be declared void as a law or an act authorized by law respecting an establishment of religion; and consequently we respectfully submit that the decree of the court of appeals of the District of Columbia should be affirmed, and the cause remanded to the supreme court of the District of Columbia, with directions to dismiss the bill.

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HENRY M. HOYT,
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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

JOSEPH BRADFIELD, APPELLANT,
v.
ELLIS H. ROBERTS, TREASURER OF the United States. } No. 76.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

It is likely that the appellant will emphasize in his oral argument the contention that the States never intended to delegate to Congress the right to take money from any citizen to be applied in the propagation of opinions which he disbelieved. The answer to that line of argument is that by no conceivable mode of reasoning can the work of this hospital be considered as the propagation of religious opinions.

So, too, we may say again, and from a somewhat different point of view, that the giving of money for

charities, to be laid out possibly in land, is contrary to the statutes of mortmain. But the reply to that is that the entire spirit of the statutes of mortmain kept in view ecclesiastical charities; was, after all, the spirit of the English law rather than of the American law, wherein the doctrine has but a limited application, and viewed the controlling and predominant ecclesiasticism of the charities with alarm rather than the charity itself. Consequently, the argument which may be drawn from the view of the court in the Dred Scott Case, that the only mode for amending the Constitution is the mode prescribed by the instrument itself, and that no tribunal could properly interject an amendment by interpretation, does not at all apply to this case; and perhaps it is unfortunate for the appellant to suggest that question upon the facts in the Dred Scott Case, which by after events fell away from the position of giving any substantial support to the principle announced.

It is merely repeating the Government contention in another form to say that the appropriation of public money for the use and support of such an institution, a consideration being given and a very important public function being thereby furthered, is in no sense a restraint upon the freedom of inquiry and private judgment nor in violation of natural rights, and such an institution as the Providence Hospital is entirely outside the definition of an establishment of religion.

President Madison, before he was President, drew a memorial and remonstrance that was presented to the general assembly of Virginia in 1785 protesting against the passage of a bill to establish a provision for teachers

of the Christian religion. This well illustrates the very point for which we are contending. The proposal was to set up an establishment of religion, or what might become an establishment of religion. If established, the system would practically deny equality of religious rights, would prefer one plan or form of teaching and doctrine to others, and would be clearly contrary to the American notions of civil and religious liberty. The remonstrance was therefore proper and sound. It does not affect the question now before the court in the least.

Finally, the appellant may argue that not only superstitious and ecclesiastical charitable use is forbidden, but also a mistaken one, and upon this proposition he may cite certain legislation and cases affecting the Mormon Church in which the *cy pres* doctrine was applied. This, again, will convict him of failing to appreciate the logical distinction which we submit; for the Mormon Church cases show that the Mormon system was "mistaken" because plainly contrary to law and against religion and morals as well, as those subjects are viewed by legislatures and all right-minded people of the country, both in the past and at present. The *cy pres* doctrine might properly be suggested in reference to them—as by the act of Congress passed in 1887 (1 Supp. R. S., 571)—viz, that the object of the incorporation of the church being mistaken and illegal, its property, upon principles applicable to property devoted to forbidden religious and charitable uses, devolved to the United States, and was subject to be disposed of according to those principles.

The notion of the *cypres* doctrine as thus suggested by the appellant immediately throws light upon the present

case. How could the incorporation of this hospital, or the use of the Government money on the contract with it for the purposes shown, be regarded as even "mistaken?" And conceding that it might be so regarded for the purpose of argument, what substituted object for its work could be indicated, as more clearly legal, which could fairly be compared with the work it is doing in value and importance to the public? No better object, surely, and, we contend, none so good.

Respectfully submitted.

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